

IN RE ARBITRATION BETWEEN:

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,

AFSCME, COUNCIL 5, LOCAL 340

and

HENNEPIN COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS Case # 06-PA-885

JEFFREY W. JACOBS

ARBITRATOR

July 31, 2006

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 34,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case 06-PA-699

Hennepin County.

APPEARANCES:

FOR THE UNION:

Matt Nelson, Business Representative
The Grievant
Steve Martincel, AFSCME #5 Rep.
Dick Dyste, Child Protection Worker
Christine Miller, Child Care Licensor

FOR THE COUNTY

Christina Yates, Labor Relations Representative
Lori Olsen, Human Resources Representative
Rachel Felch, former St. Joseph's employee
Eve Rembleski, St. Joseph's employee
Gregory Gardner, HC Unit Supervisor
Dan Capouche, Human Services Manager
Deborah Huskins, Area Dir. of Human Services

PRELIMINARY STATEMENT

The hearing in the above matter was held on June 27, 2006 in Room A-400 in the Hennepin County Government Center in Minneapolis, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs postmarked July 19, 2006 and received by the arbitrator by e-mail on July 19, 2006 at which point the record was considered closed.

ISSUES PRESENTED

Did the employer have just cause to terminate the grievant and if not, what shall be the remedy?

PARTIES' POSITIONS

COUNTY'S POSITION:

The County's position is that there was just cause for the grievant's termination since he engaged in a sexual relationship with an employee of the St. Joseph's Home in the workplace. In addition, he had reason to know that the woman with whom he was having this sexual relationship was a victim of child abuse herself. This behavior made the grievant too high a risk to engage in such behavior again. In support of this position the County made the following contentions:

1. Hennepin County contracts with St. Joseph's Home for Children to provide emergency shelter for abused and neglected children. The County maintained an office at the St. Joseph's location and the grievant was often based out of that location.

2. The grievant became involved sexually with a St. Joseph's employee named Rachel Felch. The County alleged that the grievant engaged in unwelcome touching and other sexual conduct while at the St. Joseph's location.

3. The County also alleged that Ms. Felch was the victim of child abuse as a minor and that the grievant knew this and exploited that in order to gain sexual favors from her.

4. Ms. Felch reported the unwelcome advances to a co-worker and reported them as non-consensual. She reported various details about the grievant and his home that only someone who had been in intimate contact with the grievant would have known.

5. When interviewed about these allegations the first time, the grievant repeatedly denied them. Once confronted with the details that Ms. Felch had provided to investigators, he finally broke down and confessed to the relationship.

6. The employer was then confronted with a "he said she said" type of case involving the allegations of sexual misconduct in the workplace. Based on the statements made by Ms. Felch and those by the grievant the investigators determined that the grievant was not truthful when he stated that these advances were consensual. They further determined that he was not telling the truth when he denied that they occurred in the workplace at St. Joseph's. It strains credibility that he would seek sexual touching and other activity while away from the workplace but never do it at the workplace.

7. The County further alleged that the grievant knew Ms. Felch's history and that she was abused as a child yet he continued to seek a sexual relationship with her. The County pointed out that the grievant works with the very same type of individuals who are being abused in some fashion. The County argued that the grievant is therefore a risk to engage in this type of behavior with regard to the children he serves in his capacity and that he is simply too great a risk to place in that position.

8. The County also argued that the claim that the relationship may have been consensual is irrelevant. The County argued that the grievant knew of Ms. Felch's history and that he knew or should have known of the need to refrain from all sexual activity in the workplace yet he clearly engaged in that conduct. Such poor judgment cannot be tolerated in the grievant's position. He must be above reproach and his actions in doing what he did here demonstrate that he cannot be trusted in the sensitive position he held. Thus termination is the only option.

The County requests an award denying the grievance in its entirety.

UNION'S POSITION

The Union's position is that the County did not have just cause for the termination and that the relationship did not occur in the workplace but rather always took place off site. In addition, the Union contended that this relationship was entirely consensual between adults and that there is simply no nexus between the off duty conduct and the workplace and no reason to believe the grievant is a risk to victimize any of the minor clients with whom he associates at work. In support of this position the Union made the following contentions:

1. The grievant is a long time employee in this department with a very good work history. He is experienced and dedicated and up until this incident has an exemplary work record. He is well regarded by co-workers and clients alike.

2. The grievant and the Union adamantly maintained that the relationship while sexual was entirely consensual. The Union pointed out that Ms. Felch drove some 50 miles to the grievant's home – twice - when she knew his wife and children were not home in order to engage in sexual activities. She further went to a hotel for the same purpose. Finally she invited the grievant to her parents' home when they were not there for the very same purpose.

3. The Union argued that it strains credibility beyond anything imaginable that Ms. Felch was somehow in a non-consensual relationship with the grievant. She clearly knew that this was a sexual relationship and she engaged in these activities more than willingly. It was only after the grievant told her that their relationship had to end and that he was not going to leave his wife and family for her that she reported this and claimed it was non-consensual. The Union claimed that this is essentially the age-old story of a woman spurned who later claims that it was “all his fault.” Accordingly her credibility is severely undercut by these facts; her allegation that there was anything unwelcome about this is simply not true. She wanted this relationship and when it ended, she claimed she was abused in order to save face.

4. The Union further pointed out that, contrary to the allegations made by investigators at the hearing, the grievant was entirely forthright with them when confronted about the nature of the relationship with Ms. Felch. He did in fact tell them about the sexual activities during the first interview. He denied that it occurred at work because it *didn't* occur at work. That was the focus of the first interview. He never lied or even attempted to cover the truth in either interview.

5. The Union argued strenuously that there was no nexus at all between this affair and the risk that the County seems to be hanging its hat on. There is no reason to believe that the grievant poses a risk to any of the clientele at St. Josephs or with any of the children he serves.

6. Surely, the Union argued, the County is not claiming that a person in the grievant's position cannot have a sexual relationship with a person who was abused as a child. Moreover, the County cannot be arguing that an extra marital affair, which occurs outside of the office and on the employee's free time, forms the basis for termination.

7. The Union adamantly denied that there was ever any sexual activity or unwelcome advances made in the office. In fact the County's witnesses admitted that they never saw any such activity and could only testify to such completely subjective matters as that Ms. Felch "seemed uncomfortable" when the grievant was around or that they saw him "staring" at her through the window. These allegations were simply specious and without any actual basis. The Union claimed that County witnesses essentially made these allegations up.

8. The Union also pointed out that the grievant was completely forthright in the investigation process and that he told the investigators what happened and when. He denied that it happened in the office because that's what they kept asking.

9. The essence of the Union's claim is that the grievant did not engage in any unwelcome or sexual activity while in the office at all. Neither did he lie to investigators when they asked him about the affair. Finally, there is absolutely no nexus or rational basis for the claim that he poses a risk as the result of this affair. Ms. Felch is simply lying to save face here. The grievant ended the affair and she wanted it to continue. The notion that anyone was "forced" to drive 50 miles to the grievant's house on two occasions, go with him to a hotel quite voluntarily and separately and then invite him to her parent's home is utter nonsense at best.

The Union requests an award sustaining the grievance, expunging the grievant's record of any discipline and awarding him full back pay and accrued benefits due to the County's actions herein.

DISCUSSION

The parties were in agreement about one thing: this is a classic "he said - she said" situation. It is also the most difficult type of case to determine since by definition, someone is not telling the truth, the whole truth and nothing but the truth.

The grievant has worked for the County for 17 years. He is by all accounts an excellent worker and has an other wise very clean disciplinary record. The evidence showed that he was eager and enthusiastic about his work and that except for this incident has had few if any complaints about the nature of his work or his workplace demeanor.

The evidence showed that the grievant's work location was often at the St. Joseph's Home for Children. St. Joseph's is an emergency shelter for children who are the victims of various types of abuse or neglect. Many of the children served are the victims of sexual abuse and other kinds of abuse as well.

Ms. Rachel Felch also worked at St. Joseph's Home but was employed by St. Joseph's. The evidence showed that the grievant had no supervisory authority over Ms. Felch nor did he direct her work in any way. The evidence showed that the two were cordial and had a professional working relationship at first but that some time in late 2003 this relationship changed.

Ms. Felch claimed that the grievant invited her to lunch and called it a date. She claimed that she told him it was not a date and that his statements made her uncomfortable. The evidence showed that they went to Bruegger's for a bagel and that no sexual activity or statements occurred there at all.

There was some evidence to indicate that the grievant and Ms. Felch shared a common Christian belief and that their shared commitment to the sanctity Ten Commandments may have brought them together. Eventually the grievant and Ms. Felch spoke of personal matters including her abuse as a child. The evidence showed that she volunteered this to him and that he did not somehow force this information from her. They spoke of other things as well, including her desire to leave to take a job in the Brainerd area and other more personal issues.

The stories diverge somewhat at this point but it was clear that the relationship became sexual and much more intimate. She claimed that the grievant attempted to touch her, expose himself to her and to fondle her while in the office. He vehemently denied this and instead claimed that while there was a sexual element to this relationship, it did not occur in the office. He did admit to an occasional hug or small kiss on the cheek but nothing more than that.

The evidence was amply clear that Ms. Felch drove to the grievant's home on several occasions knowing full well that the grievant's wife was not home. She testified that he asked her there for sexual purposes but almost in the same breath denied that she had any idea he would attempt a sexual advance once she got there. She drove to his home on multiple occasions. It was clear that sexual activity occurred there at these times. She claimed that he forced himself on her and that she resisted but ended up in his bedroom anyway. Without going into detail, sexual activity occurred there as well. In addition, she met him at a hotel again for the purpose of sexual activity. She also invited him to her parents' home knowing full well that they were not there. This was very much during the course of the sexual relationship between the two.

The grievant admitted that these instances occurred and admitted to a sexual relationship during the initial interview with investigators, discussed more below, but claimed that Ms. Felch asked him only to perform certain acts on her, which he did. He claimed that she did ask him not to perform other acts and that he honored those wishes and did not.

None of the people called on behalf of the County bore witness to any sexual activity whatsoever between these two. Ms. Rembleski testified that Ms. Felch came to her upset about what was going on and that she reported what Ms. Felch told her to other staff. She testified however that she did not witness any sexual touching or other sexual activity between Ms. Felch and the grievant and testified only that she noticed a change in Ms. Felch's demeanor whenever the grievant was around, which was frequently given the nature of his work, but could testify to nothing more than that. Her testimony did not support the County's claim that the activity occurred at the workplace.

One of the mainstays of the County's case is that the grievant lied during his initial interview with investigators. County witnesses testified that they interviewed Ms. Felch and that she gave them great detail about the grievant's body and some of the details of his bedroom and other locations within his home. The County investigators noted the problem they had with no actual witnesses to the alleged abuse and only one person's word versus another's for what happened. The County determined however that the grievant was being less than forthright about these allegations and that he denied the affair when first confronted with it. Only after they confronted him with the details that Ms. Felch gave them, details that only a person with fairly intimate knowledge of the grievant and his house could know, did he admit to the affair.

The County terminated the grievant for allegedly touching Ms. Felch in an unwanted and unwelcome way while at the workplace. The County also based the action to discharge the grievant because he knew Ms. Felch was a victim of sexual abuse as a child and that he, as a trained Child Protection Social Worker, should have known not to engage in this type of behavior with her. The County alleged that this demonstrated such bad judgment that the grievant could no longer effectively function in his position. Finally, the County based their action on the allegation that the grievant spent inordinate amounts of time staring at Ms. Felch thus making her feel uncomfortable and disrupting the workplace. These allegations will be dealt with in reverse order.

Simply stated, there was insufficient evidence to establish that the grievant was disrupting the workplace. Several witnesses said they noticed that the grievant was staring at Ms. Felch but provided few if any details for this and gave only the most subjective of testimony about this. No one complained about it when it was supposedly happening and there was no notice to the grievant that his behavior, if any, was causing a disruption of the workplace or was causing any discomfort in Ms. Felch. It was apparent that this allegation might well have been created by the fact of the allegations of the sexual liaison between the grievant and Ms. Felch that arose later.

On this record there was little, if any, credible evidence upon which to base a finding that the grievant's behavior caused the disruption alleged by the County. Further, as noted above, none of the County's witnesses were able to testify that they saw anything that appeared to be unwanted or unwelcome sexual conduct or speech between the grievant and Ms. Felch. Without more actual evidence of the grievant's behavior, one cannot reach the conclusion that he engaged in the conduct as alleged.

The second allegation was that the grievant was a risk to the County given his lack of discretion in becoming involved in a sexual affair with Ms. Felch. The basis for this is that she was the victim of sexual abuse as a child and that this somehow places the County at risk that the grievant may engage in this type of behavior with one of the children in his care. The County alleged that this is simply too high a risk and that they cannot retain the grievant in his present capacity given his poor judgment.

After listening to the testimony and considering all of the evidence in this matter it was certainly true that the grievant exhibited very poor judgment in getting involved with Ms. Felch. To sustain a discharge however there must be a nexus based on credible probative evidence or testimony that the grievant's behavior places the County at greater risk that he would engage in inappropriate behavior with a child. No such evidence was presented. Several of the County's witnesses testified that they felt that the grievant's lack of discretion made him more likely to engage in such behavior. No rationale for why this would be true was offered. Moreover, one cannot make the quantum assumption that engaging in what the evidence showed was clearly a consensual sexual relationship with an adult would somehow make the grievant more likely to engage in unwelcome inappropriate sexual behavior with a minor in his care. In fact the evidence in this case was the exact opposite. The grievant's work record has been exemplary and there has been not a single shred of evidence to suggest that he would have any propensity whatsoever to engage in sexual conduct of any kind with a child.

The County produced witnesses who stated that they felt that the grievant was now a risk to abuse the client given his conduct with Ms. Felch and given the fact that she was a victim of abuse as a child. This testimony was conclusory in nature and lacked any credible foundation upon which that conclusion could be based. There was simply nothing on this record to demonstrate that the grievant was somehow a risk for abusing children in his care based on the fact that he and a consenting adult had a sexual relationship. There was certainly nothing on this record to suggest that having such a sexual relationship with someone who happened to have been a victim of abuse as a child makes someone a risk to abuse children now. Without more evidence on this point the County's claim cannot be sustained.

It is clear that the grievant and Ms. Felch exhibited a serious lack of discretion in this case. Such things do happen and there is no policy against having an extra-marital affair that would in this case provide grounds for discipline. Indeed, that is not the County's position. The County simply stated that becoming involved with an adult who had a history of sexual abuse as a child makes the grievant a greater risk of becoming involved with a child now. There was simply no evidentiary basis for that in this case.

Lastly, there was the much more difficult question of whether the grievant engaged in unwelcome sexual conduct in the workplace. This would have been a serious charge if it had been proven. It was clear that the County has a very clear policy against any type of workplace violence or sexual harassment of any kind and that it is not and cannot be tolerated. The question here is whether the grievant in fact engaged in that type of behavior in this case on these facts.

The grievant flatly denied any sort of unwanted sexual behavior in the office at St. Joseph's. The evidence showed that the reason for the termination was that he engaged in very serious misconduct such as grabbing her genitals, buttocks and breasts and exposed himself to her in the office. Significantly, no one saw this conduct.

The County argued that Ms. Rembleski was a corroborative witness but in fact she provided no hard evidence at all. The sum total of her testimony was that Ms. Felch came to her and made the allegations that eventually led to the grievant's termination. At best her testimony was hearsay. It is significant too that the grievant's and Ms. Felch's story diverged greatly. She alleged that the conduct listed above happened at work while he denied that in its entirety.

The County appeared to base their determination on the credibility of the grievant and alleged that he lied to them in the initial interview. Having thus impeached his own credibility, so the claim goes, the County determined that she was more credible. The evidence at the hearing demonstrated beyond doubt just the opposite.

First, a review of the initial interview, Employer Exhibit 3, revealed that the interviewer indicated at first that the grievant denied all the allegations. Further on in that same interview however it was clear that he did quite freely admit to the sexual nature of the relationship. It was also clear from a comparison of the notes of that interview to the testimony given at the hearing that his was by far the more plausible and accurate version of events.

It was quite clear that he admitted to a sexual liaison with Ms. Felch in the first interview. While some of the details were left out it was also clear that these were notes of the meeting and not a transcript of the discussion. It was curious at best as to why the County alleged that he was not telling the truth about the sexual nature of the relationship in the first interview when it was apparent that most of the first interview was about the sexual nature of the relationship. It was equally curious that the interviewers claimed at the hearing that the grievant had denied that Ms. Felch was at his house and yet in the first interview he clearly indicated that she *was* at his house twice. He also admitted having a sexual relationship with her at that time as well. This cast the accuracy and veracity of the notes in a less than favorable light.

The testimony showed that there was some sexual activity but that he respected her wishes not to engage in sexual penetration and that this did not occur. It was clear too that the focus of the first interview was about whether the actions took place in the *office* not whether they had occurred at all. The grievant denied all along that there was any sexual activity in the office or the workplace.

Ms. Felch indicated in her interviews and at the hearing that she was afraid of the grievant. There was again only the most conclusory evidence of this and the other testimony did not support any such allegation. To the contrary, no other witness indicated that there was any reason to fear the grievant or that he ever exhibited any behavior or said anything that would have led to the conclusion that he was a physically abusive or assaultive person. Other than Ms. Felch's bald assertion that she went to the grievant's home and to a hotel and to her parents' house out of fear there was no other evidence to support this allegation.

Finally, there is the ultimate question of who is more likely to be telling the truth here. This is always a most difficult determination and in some cases the truth is somewhere in between. Here the grievant appeared to admit a most embarrassing situation in the first interview. He was married and to discuss these kinds of allegations in this setting would certainly have been difficult. Had he completely fabricated the story about Ms. Felch coming to his home there might well have been greater support for the claim that the grievant was lying or covering his tracks to avoid discipline.

Here however the evidence was to the contrary. Ms. Felch would have the arbitrator believe that out of fear she drove to the grievant's home on two occasions, some 50 miles one way, to meet him after he had exhibited unwanted sexual behavior in the office and that she was not aware of his desires for a more physically intimate relationship. Ms. Felch also testified that she continued to believe his sexual behavior would stop and yet she kept driving to various places to meet him for sexual activities all the while claiming that she regarded this as unwanted. Clearly if there had been even a scintilla of evidence to suggest that she was subjected to unwanted sexual touching or conduct of any kind this matter would have gone in a very different direction. There was not.

It should be noted that the determination that Ms. Felch's credibility is sorely lacking is based not on the inconsistency with the grievant's testimony but rather with her own. It simply does not square with reality or rationality that she would continue to go to all these places, drive the distances she did, engage in the conduct that she testified occurred, say nothing about it to anyone until after he apparently wanted to end the relationship and expect anyone to believe that whatever conduct the grievant was engaging in was unwelcome. Determinations of this nature must depend on the reasonable and rational inferences to be drawn from the evidence taken as a whole. Here her story just does not make any sense. It is thus clear from the evidence and the inferences to be drawn from them that the relationship was consensual in every way and that Ms. Felch is simply either not telling the truth or has such a poor memory of these events that her credibility is sorely undercut.

The County argued that it strains credibility to assume that the grievant would have engaged in all these acts outside of work and yet not engage in at least some of what Ms. Felch said occurred at work. Serious consideration was given to that argument. Here however, given the grievant's far more credible story it is quite plausible that the events unfolded just as he said they did: i.e. that Ms. Felch and he engaged in sexual behavior outside of the office and never engaged in such behavior in the office in order to maintain proper workplace decorum. Occasional indiscretions do not make someone a complete fool all the time. Here, the simple fact is that the grievant's testimony and story is far more plausible than was Ms. Felch's. Based on the evidence as a whole it is thus determined that no sexual conduct of any kind occurred in the workplace.

It is critical for these parties to know that if the evidence had shown that the grievant had engaged in unwelcome sexual conduct in the workplace, the County's position would be far stronger. That is obviously not this case. The policy against unwanted or unwelcome inappropriate conduct is quite clear in the County. This decision is not based on a lack of clarity with the policy but rather with the determination made based on the credibility of the principal witnesses in this matter.

What the grievant did was certainly ill advised. However, whether it was immoral or simply bad judgment is not the issue. The issue is whether there is just cause to discharge this grievant on these facts. Having made the determination that there was insufficient cause for the discharge alternative penalties were considered. The question then is whether the grievant engaged in some conduct that warranted a lesser penalty. Having made the determination that there was no misconduct while at work no such determination can be made based on that allegation. Similarly, having determined that the grievant did not create a hostile or disruptive work place environment no such discipline can be meted out based on this allegation.

Finally, the simple fact of having a failed extra-marital affair, which is what this whole scenario amounted to, does not on this record create a situation that places the grievant at greater risk of engaging in any type of inappropriate behavior with one of the minor clients. Accordingly, there are simply no facts upon which any discipline can be based on this record.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated to his former position within 3 working days of this Award. In addition, the grievant shall be made whole for all lost wages and accrued contractual benefits and his record expunged of the discipline herein.

Dated: July 31, 2006

Jeffrey W. Jacobs, arbitrator